



**The Comptroller General
of the United States**

Washington, D.C. 20548

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Decision

Matter of: Fryer Engineering
File: B-233835
Date: March 17, 1989

DIGEST

1. Protest challenging awardee's ability to properly perform under the contract is dismissed as it concerns the awardee's responsibility. General Accounting Office will not consider a protest of an agency's affirmative determination of responsibility absent a showing of fraud or bad faith on the part of the procurement officials, or an allegation that definitive responsibility criteria were not applied.
2. Allegations that awardee does not intend to perform the contract in compliance with the specifications and domestic manufacture requirements are dismissed as they involve contract administration and therefore are not for consideration under General Accounting Office's Bid Protest Regulations.
3. Protester's contention that the rejection of its proposal was improper is untimely where not filed within 10 working days of the protester's receipt of its rejection notice.
4. Protest based on allegedly unduly restrictive or improper specifications, which were apparent from the face of the solicitation, is untimely where not filed until after award.

DECISION

Fryer Engineering protests the award of a contract to NASA Machine Tool Co., division of R&D Manufacturing Co., Inc., under request for proposals (RFP) No. DLA002-88-R-7500 for the supply of computer numerical control (CNC) milling machines, issued by the Defense Industrial Plant Equipment Center, Defense Logistics Agency (DLA). Fryer alleges that

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NASA does not qualify for award since it cannot comply with the contract specifications or requirement to supply items of domestic manufacture.

We dismiss the protest.

The RFP specifically required the U.S. Customary System of Units, as opposed to the metric system, to be used in the design and construction of the milling machines and on measuring and indicating device calibration. The agency explains that it is undesirable to introduce a machine built to the metric system into a system of all U.S. Customary Unit built machines, because the metric machine would require a separate set of tools, and create special care, maintenance, repair and replacement needs. The RFP also included, by amendment 0001, the clause "Restriction of Acquisition of Foreign Machine Tools (Apr. 1988)" (Defense Acquisition Regulations Supplement § 52.225-7003) under which the contractor agrees to supply machine tools of United States or Canadian origin.

Six offers were received in response to the solicitation. Fryer submitted two offers both of which were lower-priced than any other firm's, but since one was technically unacceptable and not capable of being made acceptable, discussions were conducted with respect to only the other offer. Fryer was the only offeror to take exception to furnishing the U.S. Customary System of Units. During discussions, the agency inquired of Fryer as to whether Fryer's proposed machine would meet this requirement. In its best and final offer, Fryer responded that it intended to supply metric system machines but that it would include a complete set of metric allen wrenches with each machine in the event that they may be needed. After reviewing Fryer's proposal, the agency determined that the requirement for a U.S. Customary System of Units was firm and could not be waived, and that other offerors, including NASA, the second lowest, complied with it. Since Fryer had not agreed to this requirement, it was notified that its proposal was technically unacceptable by a letter dated November 14, 1988, and on December 2, Fryer received a Notice of Award which stated NASA had been awarded the contract.

On December 12, Fryer filed a protest in our Office alleging that NASA cannot manufacture a machine that meets the contract requirements for: (1) a U.S. Customary System of Units, and (2) the restriction on foreign machine tools. Fryer contends that there are currently no foundries in the United States that make castings which conform to the DLA's specifications, and that, therefore, NASA must import its cast iron from Taiwan. Fryer alleges that all imported

cast iron comes into the United States with metric threads, and that the facilities in Taiwan are unable to produce castings with the U.S. System of Units due to the unavailability of required parts. Fryer also speculates that it is unlikely that a foundry would produce special castings for a small number of machines. In addition, Fryer contends that since NASA intends to use a Fagor brand CNC control, which is manufactured in Spain, it is questionable whether NASA's proposed machine qualifies as domestic since less than 50 percent of the cost of its components will be attributable to those which are United States manufactured.

The agency contends that Fryer's protest is without merit since the agency's pre-award survey of NASA revealed that not only did NASA intend to supply machines made to the U.S. Customary System of Units, but also that NASA intends to use American- and Canadian-manufactured components which comprise over 50 percent of the machines' costs, and had so certified. Further, NASA has submitted additional information as a result of the protest supporting the findings of the pre-award survey.

To the extent that Fryer is challenging NASA's ability to properly perform under the contract by supplying conforming machines, its protest concerns NASA's responsibility. Our Office will not consider a protest of an agency's affirmative determination of responsibility absent a showing of fraud or bad faith on the part of the procurement officials or an allegation that definitive responsibility criteria were not applied. 4 C.F.R. § 21.3(f)(5) (1988). The protester has not made such a showing.

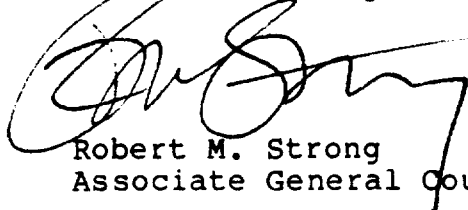
To the extent that Fryer is alleging that once awarded the contract, NASA will not provide milling machines with the U.S. Customary System of Units, its protest concerns a matter of contract administration and, therefore, is not for consideration under our Bid Protest Regulations, 4 C.F.R. § 21.3(f).

Fryer's protest may also be read as raising two additional issues, both of which are untimely. First, any objections Fryer has to the rejection of its proposal is untimely. In order to be timely, a protest must be filed within 10 working days after the basis of protest is known. 4 C.F.R. § 21.2(a)(2). Since Fryer was notified on November 14 that its proposal was rejected and it did not file a protest in our Office until December 12, it is untimely.

Second, to the extent that Fryer contends that the U.S. Customary System of Units or domestic manufacture requirements are unduly restrictive or otherwise improper, its protest is also untimely. Our Bid Protest Regulations require that protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals must be filed prior to the closing date for receipt of initial proposals or, if the alleged impropriety is in an amendment, by the closing date as extended. Since Fryer's protest was not filed until after it received notice of award to another, this basis for protest is untimely. 4 C.F.R. § 21.2(a)(1).

Moreover, in response to Fryer's allegation that NASA's product will not qualify under the domestic manufacture restrictions, we have reviewed NASA's proposal and determined that it does contain the necessary certification. NASA is therefore contractually bound to comply with those requirements. Whether it ultimately does, in fact, comply with them is a matter of contract administration not for our consideration under our Bid Protest Regulations, 4 C.F.R. § 21.3(f); Autospin, Inc., B-233778, Feb. 23, 1989, 89-1 CPD ¶ ____.

We dismiss the protest.

A handwritten signature in black ink, appearing to read "R. Strong", is written over the typed name and title.

Robert M. Strong
Associate General Counsel